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CASE NO. 80-2043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Board of Education,
Island Trees Union Free
School District No. 26, et al.

Petitioners

v.

Steven A. Pico, et al.

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

Brief for Amici Curiae Charles H Keating, Jr. and Citizens for Decency through Law, Inc. in Support of the Petitioners

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Brief of Amici Curiae in
Support of the Petitioners

QUESTIONS PRESENTED

1. Whether the local School Board's right to manage and control the schools within its district is greater than the limited First Amendment rights of junior high and high school students in a public school system, particularly where the students' exercise of their own freedom of speech is not directly implicated by the

retention or removal of school library books?

2. Whether junior high and high school students in a public school system do not have a sufficient First Amendment interest in order to be entitled to procedural due process on the issue of the retention or removal of school library books?

SUMMARY OF ARGUMENT

The school Board's right to manage and control the public schools within its district takes precedence over the limited First Amendement rights of students particularly where, as here, the students' exercise of free speech is not directly implicated by the removal of school library books. Although Tinker v. Des Moines School District, 393 U.S. 503 (1969) recognized students' First Amendment rights inside as well as outside school, those rights are not unlimited nor do they extend as far as

adults' rights in the "marketplace of ideas." Even in Tinker, this Court stated that a student's First Amendment rights had to be "applied in light of the special characteristics of the school environment." Id., at 506.

In the instant case, the students' free speech rights are not only limited but they are also not directly implicated. No student has been refused permission to exercise his right to speak. The students and teachers are free to discuss the ideas raised in the removed books and the books themselves. There has been no suppression of ideas.

The record is clear that the School Board removed all but one of the books from the school library because they "contained indecent matter, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversion, or disparaging remarks about Blacks, Jews, or Christ." Pico v. Board

of Education, Island Trees Union Free School District No. 26, 638 F.2d 404 (2nd Cir. 1980) (Mansfield, C.J., dissenting). The majority of the court below apparently believes that if the School Board in fact was motivated by its members' political beliefs, then their action in removing the books somehow rose to the level of a constitutional violation. However, the decisions of the Tenth and Seventh Circuits and other decisional law in the Second Circuit have not so held. Cary v. Board of Education, 598 F.2d 535, 544 (10th Cir. 1979); Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1305 (7th Cir. 1980); Presidents Council District 25 v. Community School Board No. 25, 457 F.2d 289, cert. denied 409 U.S. 998 (1972). See also Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2nd Cir. 1980).

Nevertheless, whether or not the School Board was in fact motivated by its members' political beliefs is not dispositive. The School Board's power and right to select textbooks, set the curriculum, and in general, manage and control the schools, including the school libraries, is paramount especially where the books removed contain obscenities, vulgarities, and religious and ethnic slurs and particularly where, as here, there has been no suppression of views. Speculation over possible political motivations in the removal of books containing indecent material is the exhaltation of form over substance.

The School Board's right must take precedence over the students' limited First Amendment rights. The school board has broad powers to remove books and set the curriculum as long as its actions are not for the purpose of

promoting a certain religion nor for the purpose of suppressing a particular point of view. The state via the School Board has a legitimate and strong interest in the protection of young people. The removal of the books was not a suppression of the content of speech; it was merely a restriction on the form the speech took. Thus, in balancing all of the factors to be considered, the School Board's right to manage and control the schools, which includes the supervision of the school libraries, clearly outweighs the limited First Amendment rights of the students.

Because of the nature of their limited interest, the students were not entitled to procedural due process on the issue of the retention or removal of the school library books. Even though the students had no right to demand it, procedural due process was complied with. The procedure adopted by the

School Board in the case at bar was reasonable, rational, and adequate to protect the limited First Amendment rights of the students.

LAW AND ARGUMENT

Proposition of Law No. 1

THE LOCAL SCHOOL BOARD'S RIGHT TO MANAGE AND CONTROL THE SCHOOLS WITHIN ITS DISTRICT IS GREATER THAN THE LIMITED FIRST AMENDMENT RIGHTS OF JUNIOR HIGH AND HIGH SCHOOL STUDENTS IN A PUBLIC SCHOOL SYSTEM, PARTICULARLY WHERE THE STUDENTS' EXERCISE OF THEIR OWN FREEDOM OF SPEECH IS NOT DIRECTLY IMPLICATED BY THE RETENTION OR REMOVAL OF SCHOOL LIBRARY BOOKS.

In Tinker v. Des Moines School District, 393 U.S. 503 (1969), this Court's authoriative decision recognized students' First Amendment rights inside school as well as outside by stating the now often quoted phrase: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of

speech or expression at the schoolhouse gate." Id., at 506. However, students' First Amendment rights are not unlimited nor do they extend as far as adults' rights in the "marketplace of ideas." Even in the cornerstone case of Tinker, supra, a student's freedom to express his opinions was limited by his doing so without

> "'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. * * * But conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. * * *"
>
> 393 U.S. at 513. (citations omitted).

In addition, this Court stated that a student's First Amendment rights had to

be "applied in light of the special characteristics of the school environment." Id., at 506. (emphasis supplied).

Some of the "special characteristics" found in a "school environment" include the authority of the state "to transmit the basic values of the community," James v. Board of Education, 461 F.2d 566, 573 (2nd Cir.), cert. denied 409 U.S. 1042 (1972), and the duty of the school to fulfill its "responsibility to promote standards of decency and civility among school children," Thomas v. Board of Education, 607 F.2d 1043, 1057 (2nd Cir. 1979). In Thomas, the Second Circuit recognized the qualified freedom of speech rights of students when it stated: "School officials must have some latitude within the school in punishing and prohibiting ordinarily protected speech both out of regard for fellow students who

constitute a captive audience and in recognition of the fact that the school has a substantial educational interest in avoiding the impression that it has authorized a specific expression." Id., at 1049. (emphasis supplied).

In the case at bar, the students' free speech rights are not only limited but they are also not directly implicated. No student has been refused permission to speak; no student has been denied the right to engage in "symbolic speech" as was the case in Tinker, supra. Here, the School Board has merely exercised its statutory duty in a reasonable manner to remove certain books from the school library.

Pursuant to New York Education Law Section 1709 and Section 701(1), the School Board was given the power and duty to (1) set the course of study, (2) select the textbooks to be used, (3)

take charge and possession of the books, and (4) manage and control the schools. As has long been recognized, a school board has broad powers over the schools in its care.

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."
> Epperson v. Arkansas, 393 U.S. 97, 104 (1968). (emphasis supplied).

In the instant suit, the record is clear that the School Board removed all but one of the books from the school library because they "contained indecent matter, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversion, or disparaging remarks about Blacks, Jews, or Christ." (The book which did not contain vulgar or indecent language was A Reader for Writers, edited by Jerome

W. Archer and Joseph Schwartz. However, it did contain one story which the School Board believed to be in such bad taste as to warrant the book's removal.) See, eg., Pico v. Board of Education, Island Trees Union Free School District No. 26, 638 F.2d 404 (2nd Cir. 1980) (Mansfield, C.J. dissenting); and the Press Release of the School Board dated March 19, 1976 and found in toto in the district court's opinion in the instant matter, 474 F. Supp. 387 (E.D. N.Y. 1979). The Respondents contend that the Board's action was motivated by the political beliefs of the School Board members. The majority of the three judge panel of the Second Circuit also appear to hold this fear, that if the School Board in fact was motivated by political beliefs, their action in removing the books somehow rose to the level of a constitutional violation. Yet, the Tenth and Seventh Circuits have

held that "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." Cary v. Board of Education, 598 F.2d 535, 544 (10th Cir. 1979); Zykan v. Warsaw Community School Corporation, 631 F.2d 1300, 1305 (7th Cir. 1980).

Even in the Second Circuit, the prior case law has not turned upon whether the removal of books containing obscene language and explicit sexual descriptions was motivated by political concerns. Presidents Council District 25 v. Community School Board No. 25, 457 F.2d 289, cert. denied 409 U.S. 998 (1972). There, the Second Circuit found that classroom discussion of the removed book and of the ideas contained in the removed book was not restricted. Also, alternate sources of obtaining the book, such as a public library, were available. Thus, the Second Circuit

concluded that "the intrusion of the Board here upon any first amendment constitutional right of any category of plaintiffs is not only not 'sharp' or 'direct' it is miniscule." Id., at 292. The requirement that basic constitutional values must be "sharply and directly implicated" before a court will intervene in a school controversy is taken from this Court's decision in Epperson, supra, at 104.

Here, classroom discussion is also unrestricted.

> "The record is undisputed that students and teachers remain free to discuss the ideas in the books, free of the indecencies and vulgarities. Plaintiffs' own statement (submitted under Local Rule 9(g)) of 'facts about which no material dispute exists' states that, although the removed books may not be assigned for reading, 'defendants have not precluded discussion about the themes of the books or the books themselves.' Defendants confirmed this in their similar statement, advising that 'no teacher has been instructed not to discuss the

> books which were removed or to refrain from discussion or comment upon the ideas and positions they represent.'" Pico v. Board of Education, Island Trees Union Free School District No.26, on denial of petition for rehearing in banc, (Mansfield, C.J. dissenting). (Slip Opinion at p. 6866). (footnote omitted).

Here, there are also alternative sources for obtaining the removed books, such as a public library or a bookstore. Thus, the determinative facts of the case at hand appear to be in accord with the Second Circuit's decision in Presidents Council, supra. See also Bicknell v. Vergennes Union High School Board of Directors, 638 F.2d 438 (2nd Cir. 1980).

Nevertheless, whether or not the School Board was in fact motivated by its members' political beliefs is not the dispositive issue. The dispositive issue concerns the power of the School

Board to select textbooks, set the curriculum, and in general, manage and control the schools, including the school libraries, especially where the books removed contain obscenities, vulgarities, and religious and ethnic slurs and particularly where, as here, there has been no suppression of views. To engage in speculation about possible political motivations in the removal of certain books containing indecent material is to exhalt form over substance. Where there are undisputed facts to support the School Board's action as reasonable and rational, ie. that a reading of the books reveals the obscenities and vulgarities complained about, the courts should not indulge in speculation as to possible political motivations. Therefore, the Second Circuit should have upheld the actions of the Island Trees Board as it did the

actions of the Vergennes, Vermont, Board in Bicknell, supra.

When balancing the School Board's right and duty to choose the books used in educating children against the students' limited First Amendment rights, the School Board's right in the instant case must take precedence. Several factors account for this. First of course is the School Board's broad power to manage and control its schools. Epperson, supra. As a long line of cases suggests, a School Board has the authority to remove books and set the curriculum where its actions were not for the purpose of promoting a certain religion nor for the purpose of suppressing a particular point of view. See, eg., Epperson, supra, Carey, supra, Zykan, supra.

Another factor is the state's great interest in the protection of its young. Here, the subject is not a college

library or a public library but the libraries of junior high and high school students. In upholding New York's "harmful to minors" statute which made the sale of sexually explicit, but not legally obscene, materials to minors illegal, this Court stated "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" Ginsberg v. New York, 390 U.S. 629, 638 (1968) (citation omitted). To hold that the pictorial depiction of sexually explicit material could not be sold to minors but that the vulgar description of the same activities must be kept in a public school library would be anomalous at the very least.

Following that reasoning raises the issue of whether a book acquires some sort of tenure merely by its presence on the shelf. Although the Sixth Circuit

has so held, Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976), amici strongly urges that such a position be rejected by this Honorable Court. The Second Circuit specifically rejected the book tenure argument in Presidents Council, supra, at 293, by stating "books which become obsolete or irrelevant or were improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place." (emphasis supplied). If a book could acquire tenure, the results could be quite disturbing. If, for example, an elementary school library wished to order a book on the Muppets and through a typographical error, the book ordered, delivered, and shelved was the hard core child pornography magazine Moppets, would the magazine acquire tenure and would the School Board be required to

keep it in the elementary school library?

Another factor accounting for the School Board's right taking precedence over the limited rights of the students is that the ideas in the books were not restricted or supressed but rather the indecent words used to express those ideas. In other words, the School Board's action was not a suppression of the content of speech; it was merely a restriction on the form the speech took. See Part IV-A of the plurality opinion in F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), for a similar analysis. Again, the students and teachers remained free to discuss the ideas in the removed books and even to discuss the books themselves. Thus, the thoughts contained in the books, even the political ideas which perhaps were unpopular with the majority of the adults residing in the instant school

district, could be expressed and discussed without resort to obscene language. In addition, this Court's decision in Pacifica Foundation, supra, rested in part upon the government's legitimate interest in protecting its young from indecent material. Pacifica Foundation at 749-750, citing Ginsberg, supra.

As discussed supra, the students' First Amendment rights have not been directly implicated in the case at bar. However, the case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) has created a First Amendment right to receive protected speech in certain circumstances. There, the right to receive advertising information on the prices of prescription drugs was upheld. Such a holding can not be stretched to encompass the instant matter. The school environment is a

vastly different arena for the expression of speech than is the general arena of the "marketplace of ideas." Even assuming arguendo that the students have some nebulous right to receive under the First Amendment, the state via the School Board has no duty to provide it. See Harris v. McRae, 448 U.S. 297, 315 (1980) (The Hyde Amendment which limits Medicaid funding for certain abortions was upheld as not violative of due process because it "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."); and Ginsberg, supra, at 636-638 (Minors have no right to receive sexually explicit "harmful" but not legally obscene material.).

Therefore in balancing all of the factors involved, the School Board's right to manage and control the schools, which includes the supervision of the school libraries, clearly outweighs the

limited First Amendment rights of the students.

Proposition of Law No. 2

JUNIOR HIGH AND HIGH SCHOOL STUDENTS IN A PUBLIC SCHOOL SYSTEM DO NOT HAVE A SUFFICIENT FIRST AMENDMENT INTEREST IN ORDER TO BE ENTITLED TO PROCEDURAL DUE PROCESS ON THE ISSUE OF THE RETENTION OR REMOVAL OF SCHOOL LIBRARY BOOKS.

The requirements of procedural due process apply only to deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). One of the many "liberty" rights encompassed within the Fourteenth Amendment includes the freedom of expression. Gitlow v. New York, 268 U.S. 652 (1952).

However, the students in the case at bar have only limited First Amendment rights under the facts. Respondents did not have a "liberty" interest sufficient

to require the School Board to grant them a hearing when the decision to remove the books was made. Therefore, any "liberty" deprivation suffered by the students was only "de minimis" and unprotected.

The deprivation was "de minimis" because of the nature of the students' limited interest and the fact that their free speech rights were not directly implicated. As this Court has said in a different context, "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another." Roth, supra, at 567. The Respondents herein remain free, as before, to seek the removed books from a public library or to purchase them from a bookstore. In addition, the students have not been restricted in their discussions of the

ideas in the removed books or the books themselves.

". . .[I]n determining whether due process requirements apply in the first place we must look not to the 'weight' but to the nature of the interest at stake." Goss v. Lopez, 419 U.S. 565, 569 (1975), citing Roth, supra, at 570-571. (emphasis supplied). An examination of the "nature of the interest at stake" clearly demonstrates that the students were not entitled to procedural due process protection in the instant case.

Even though the students had no right to demand it, the School Board complied with procedural due process as a perusal of the facts as given in the district court's opinion reveals. Pico, supra, 474 F. Supp. at 387 et. seq. The School Board even established an independent committee to assist them in their decision. That the Board did not

follow all of the recommendations of the committee is immaterial because they were under no duty to provide for a committee review and they were under no mandate (nor could they have been) to accept the recommendations of any committee.

Therefore, as the district court's opinion and the dissenting opinion of Circuit Judge Mansfield make clear, the procedure adopted by the School Board in the case at bar was reasonable, rational, and adequate to protect the limited First Amendment rights of the students. The procedure followed certainly was ". . . appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

CONCLUSION

For the reasons stated herein, the decision of the United States Court of Appeals for the Second Circuit should be

reversed and remanded with directions to affirm the decision of the United States District Court for the Eastern District of New York.

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